Supreme Court, U.S.
FILED

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No. -

In The

Supreme Court of the United States

October Term, 1995

JOHN J. NICIT,

Petitioner,

vs.

ANNA MARIE NICIT,

Respondent.

Petition for Writ of Certiorari to the Court of Appeals of the State of New York/Supreme Court Appellate Division Fourth Department

PETITION FOR WRIT OF CERTIORARI

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(21248)

40 pp

QUESTIONS PRESENTED

I

Did the New York Courts commit constitutional error in giving full faith and credit to wife's ex parte Alabama divorce judgment where no proof of her domicile in that State was submitted to the Divorce Court?

II

Even assuming the validity of that Judgment to dissolve the marriage, per se, is the New York Statute [DRL 236B]* unconstitutional in permitting the judgment to be directly used to affect husband's property rights since the Alabama Court did not have personal jurisdiction over him?

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*"2. Matrimonial actions. * * * the provisions of this part shall be applicable * * * to proceedings to obtain maintenance or a distribution of marital property following a foreign judgment of divorce, * * *."

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... *i*

TABLE OF CASES ..... *iv*

FACTS AND PROCEDURAL HISTORY 1

JURISDICTION OF THIS COURT 2

ARGUMENT 2

I—THE ALABAMA JUDGMENT IS JURISDICTIONALLY DEFECTIVE AND VOID BY REASON OF LACK OF PROOF IN THE JUDGMENT ROLL OF PRE-REQUISITE BONA FIDE RESIDENCE 2

II—THE N.Y. STATUTE OFFENDS DUE PROCESS IN PERMITTING THE EX PARTE DIVORCE JUDGMENT TO AFFECT HUSBAND'S PROPERTY RIGHTS SINCE THE DIVORCE COURT DID NOT ACQUIRE PERSONAL JURISDICTION OVER HIM 3

INDEX TO APPENDIX

Petition for Equitable Distribution [served 3/14/94]..... A-1

Answer A-4

Notice of Motion for Summary Judgment dated 6/27/94. A-6

Supporting Affirmation..... A-8

Alabama Divorce Judgment Roll A-10

Decision (Harvey, J.) dated 7/11/94 denying Motion..... A-18

Appellate Division Affirmance dated 12/23/94 ..... A-21

Findings Excerpts

Numbers 16 through 19 and 41 ..... A-22

Conclusions of Law Excerpt

Conclusion of Law No. 2..... A-23

Final Judgment Excerpts

Page 1..... A-24

Last Paragraph Page 3..... A-25

Decision of Affirmance by Appellate Division dated 7/14/95 ..... A-26

Notice of Appeal to Court of Appeals A-27

Order dismissing Appeal dated 11/2/95 ..... A-29

TABLE OF CASES

	Page
Bennett, 103 A.D.2d 816, 2nd Dept., 478 N.Y.S.2d 47 ...	4
Chavis, 394 So. 54	3
Estin, 334 U.S. 541, 68 S. Ct. 1213	4
Kessel, 205 A.D. 51, 199 NYS 174, 1st Dept.	3
Lynn, 302 N.Y. 193, 97 N.E. 2d 748	4
Martin, 173 Ala. 106, 55 So. 632	3
Peterson v. Goldberg, 180 A.D.2d 260, 263, 2nd Dept., 585 N.Y.S.2d 439	4
Vanderbilt, 354 U.S. 416, 77 S. Ct. 1360	4
Williams v. N.C., 325 U.S. 226, 65 S. Ct. 1092	3

FACTS AND PROCEDURAL HISTORY

Parties resided in New York. Wife left husband in 1986 and sued for divorce in New York on the ground of cruelty. It was dismissed at the close of her proof with a finding of abandonment. She sued again on the same grounds in a different County in 1990, and was dismissed on summary judgment. She then procured an ex parte Alabama divorce in 1993 and brought the instant proceeding in 1994 for "Equitable Distribution" of marital assets pursuant to New York's Domestic Relations Law §236B(2) which permits same "following a foreign judgment of divorce."

Husband moved for summary judgment on the constitutional points raised herein. The denial of the motion by the Trial Court on 7/11/94 [Appx. 18] was unanimously affirmed by the intermediate Appellate Court — the Appellate Division — on 12/23/94 [Appx. 21, 210 App. Div. 2nd 987].* The only way to get to the Court of Appeals at that stage was by leave of the Appellate Division. The motion therefor was denied February 3, 1995.

While those appellate proceedings were going on, the trial judge nevertheless proceeded with trial on the merits which eventuated in a judgment entered 12/12/94 awarding wife well over half husband's assets [Appx. 24]. Unanimously affirmed by the Appellate Division on 7/14/95. [Appx. 26 not yet reported].

An appeal as of right was then taken to the Court of Appeals because of the constitutional questions which were preserved from the motion for summary judgment.* However the Court on

---

* Not yet reported in NYS 2d.

* Civil Practice Law & Rules 5601(b): "An appeal may be taken to the Court of Appeals as of right: 1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; - -." [Appx. 27]

11/2/95 sua sponte dismissed the appeal "upon the ground that no substantial constitutional question is directly involved." [Appx. 29]

The Findings and Judgment are voluminous in detailing property division. Hence only those portions relevant to this application are appended.

JURISDICTION OF THIS COURT

This Petition is submitted pursuant to 28 USC 1257(a) and Rule 10.

ARGUMENT

The above ground of the Court of Appeals' dismissal is mystifying since the final judgment was necessarily based upon the Alabama decree and the New York statute, both of which are subject to constitutional attack as developed below.

I

THE ALABAMA JUDGMENT IS JURISDICTIONALLY DEFECTIVE AND VOID BY REASON OF LACK OF PROOF IN THE JUDGMENT ROLL OF PREREQUISITE BONA FIDE RESIDENCE.

> "When the defendant is a non-resident, the other party to the marriage must have been a bona fide resident of this state for six months next before the filing of the Complaint, which must be alleged *and proved.*" [Alabama Statutes Title 30 *Marital & Domestic Relations* — "Divorce and Alimony" Sec. 30-2-5, emph. added].

Wife's *unverified* Complaint in Alabama alleges residence therein but no proof was submitted. The decree erroneously recites that it is based "upon the affidavit of plaintiff." The only affidavit filed was her attorney's which says nothing about resi-

dence. Plaintiff herself did not even sign any paper much less swear to anything in the action and the decree does not recite a finding of residence [Appx. 16]. Given all that, there can be no presumption of regularity. In accordance with *Williams v. N. C.* [325 U.S. 226, 65 S. Ct. 1092] the Alabama decisions hold such a judgment to be void [*Chavis v. Chavis,* 394 So. 54; *Martin v. Martin,* 173 Ala. 106, 55 So. 632]. Where a judgment is void at the forum, it is void everywhere, hence not entitled to full faith and credit [Kessel v. Triangle, 205 A.D. 51, 199 NYS 174, 1st Dept.].

The New York courts completely ignored that point and simply held the evidence submitted by wife *in this proceeding* sufficed to prove domicile. Thus:

> "The record [in the court below] supports the court's determination that petitioner had acquired a bona fide domicile in Alabama at the time the divorce action in that State was commenced." [Appx. 21]

This kind of expedient jurisprudence makes a shambles of constitutional as well as general legal principles. It is elementary that what is void, by definition, cannot be validated nunc pro tunc especially in a collateral proceeding.

II

THE N.Y. STATUTE OFFENDS DUE PROCESS IN PERMITTING THE EX PARTE DIVORCE JUDGMENT TO AFFECT HUSBAND'S PROPERTY RIGHTS SINCE THE DIVORCE COURT DID NOT ACQUIRE PERSONAL JURISDICTION OVER HIM.

It is elementary that where personal jurisdiction of a defendant was not obtained, a foreign judgment although effective to dissolve the marriage [if plaintiff was a bona fide resident]

> "was entitled to no effect at all so far as support or other property rights were concerned."

[*Vanderbilt v. Vanderbilt*, 354 U.S. 416, 77 S. Ct. 1360; *Accord: Estin v. Estin*, 334 U.S. 541, 68 S. Ct. 1213; *Lynn v. Lynn*, 302 N.Y. 193, 97 N.E.2d 748; *Bennett v. Bennett*, 103 A.D.2d 816, 478 N.Y.S.2d 47].

Although the Alabama decree itself does not purport to deal with such rights, yet it is automatically given that effect under DRL 236B which authorizes "proceedings to obtain maintenance or distribution of marital property following a foreign judgment of divorce"; the same as if it were a New York decree.

> "A cause of action for equitable distribution 'following a foreign judgment of divorce' *vests upon the entry of the foreign judgment.* [DRL 236(b)(5)(a)] *as it would upon entry of a divorce judgment in this State.*" [Emph. added]

[*Peterson v. Goldberg*, 180 A.D. 2d 260, 263, 2nd Dept., 585 N.Y.S.2d 439, where the issue was whether wife's death abated the pending equitable distribution proceeding. Held not. Court of Appeals denied leave to appeal 81 N.Y.2d 835, no NYS 2d citation].

Thus the N.Y. court acts as a mere conduit for channeling the legal force which emanates from the Alabama judgment. So that the effect is equally offensive to due process as in *Vanderbilt* and *Estin*.

Here again the issue was not dealt with below. Special Term's decision is completely silent [Appx. 18], while the Appellate Division's reads:

> "We reject respondent's contention that Petitioner is precluded from maintaining this proceeding on the ground that she obtained the foreign divorce judgment." [Appx. 21]

This misses the vital due process point of husband not having been subject to personal jurisdiction.

CONCLUSION

We think the case merits review under Rule 10 because the decision below conflicts with this Court's holdings and presents constitutional questions important to our federal system. The writ should be granted.

Dated: January 16, 1996

Respectfully Submitted,

JOHN J. NICIT, Pro Se
Attorney for Petitioner
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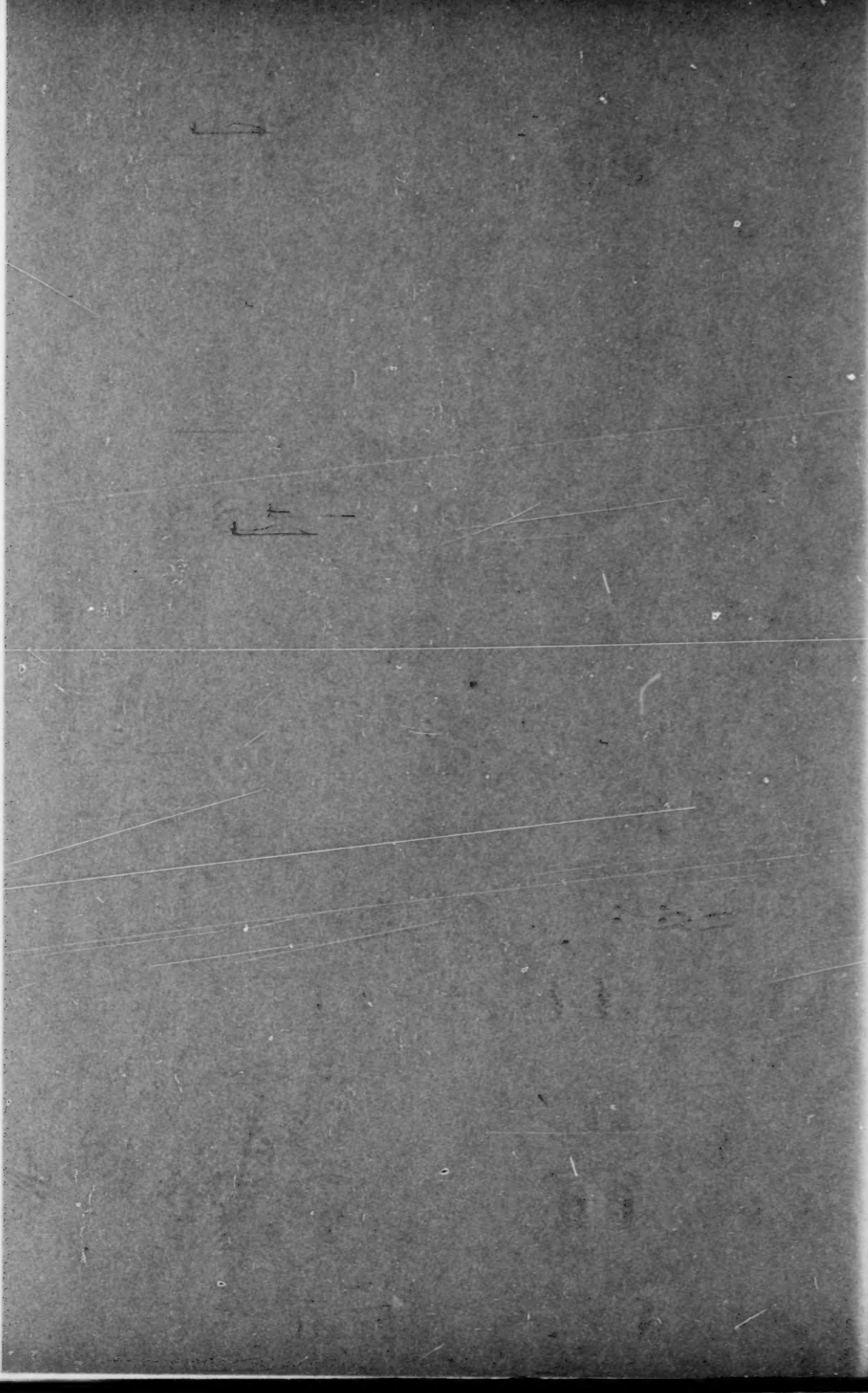
Waterloo, New York 13165
Telephone: (315) 539-9211

APPENDIX



PETITION FOR EQUITABLE DISTRIBUTION

SUPREME COURT
STATE OF NEW YORK COUNTY OF SENECA

ANNA MARIE NICIT, Petitioner, vs. JOHN J. NICIT, Respondent.	PETITION FOR EQUITABLE DISTRIBUTION Index No.

Petitioner alleges:

1. The parties herein were married on August 24, 1956, in the State of New York.

2. There are no minor children as issue of the marriage of the parties.

3. During the time that the parties were married and lived together, they resided at 4560 East Lake Road, Geneva, New York 14456.

4. On October 5, 1992, after a six-year separation from the respondent, petitioner relocated to Houston, Alabama.

5. On November 9, 1993, petitioner obtained a divorce from the respondent in the State of Alabama.

6. Respondent did not appear in the above action for divorce, either personally or by counsel, although respondent was personally served with a copy of petitioner's Summons and Complaint for divorce. See petitioner's Summons and Complaint, attached hereto as Exhibit "A" and "B," and Affidavit of Service attached hereto as Exhibit "B."

7. The issue of maintenance was previously addressed by a New York State Family Court order, which was in no way superseded by the Alabama decree, and which was specifically incorporated by reference into by the Alabama divorce decree; however, the divorce decree from the State of Alabama did not make any provision for equitable distribution of the marital property.

8. On or about January 6, 1994, an authenticated copy of the divorce judgment was filed with the County Clerk of Seneca County. A copy of that decree is attached hereto and made a part hereof as Exhibit "C."

9. Respondent was personally served with a copy of the decree. See Affidavit of service attached hereto as Exhibit "D."

10. During the years of their marriage, the parties acquired many items of property in a manner which would make them marital property under the laws of the State of New York.

11. Petitioner is entitled to equitable distribution of marital property and the disposition of separate property under the guidance of the Court.

12. Among the items to be distributed are the proceeds from the sale of the marital residence, which was purchased from joint funds and recently sold, and to which petitioner made substantial contribution.

13. In addition, the items of property found on the annexed schedule (attached hereto as Exhibit "E") are subject to equitable distribution. The approximate value of each item has been provided for the court's information.

14. Upon information and belief, respondent also maintains a law practice. Respondent is a sole practitioner, and petitioner has contributed to the establishment of his practice.

15. Other assets may also be subject to equitable distribution, and petitioner will need the opportunity to engage in discovery to determine the existence and extent of such additional assets.

16. No prior application for the relief requested herein has been made.

WHEREFORE, petitioner respectfully requests that this Court:

A. Schedule a pretrial conference in this matter;

B. Issue a scheduling order at that time requiring the parties to exchange pertinent financial information, including sworn statements of net worth, tax returns, bank statements, pension and IRA information, cancelled checks, and other relevant financial information, and following the exchange of such information, allow for the parties' depositions to be taken within a prescribed time period; and

C. Following discovery, set this matter down for trial on the issue of equitable distribution.

DATED: February 15, 1994
Rochester, New York

Yours, etc.

Harris Beach & Wilcox
David C. Boysen, Esq.,
of Counsel
Attorneys for Petitioner

ANSWER

STATE OF NEW YORK
SUPREME COURT COUNTY OF SENECA

ANNA MARIE NICIT,

Petitioner,

-vs- ANSWER

JOHN J. NICIT,

Respondent.

Respondent, answering the Petition:

1. Denies Par. 5, 10, 11, 12, 13 and 14 (last line).

FOR AN AFFIRMATIVE DEFENSE:

2. The Alabama decree is jurisdictionally defective and void.

FOR A SECOND AFFIRMATIVE DEFENSE:

3. The Courts of New York have held in two separate divorce actions that petitioner is not entitled to Equitable Distribution.

4. This proceeding is therefore barred by res judicata.

FOR A THIRD AFFIRMATIVE DEFENSE:

5. DRL 236B is unconstitutional and unenforcible insofar as it purports to provide for Equitable Distribution herein where the Alabama Court did not obtain personal jurisdiction over respondent.

FOR A FOURTH AFFIRMATIVE DEFENSE:

6. New York public policy contemplates and permits judicially imposed Equitable Distribution only where the underlying divorce decree is based upon fault.

7. The Alabama is not such a decree.

WHEREFORE respondent requests an Order requiring petitioner to post security for costs forthwith, and dismissing the Petition with costs.

Dated: April 1, 1994

Yours, etc.
s/ Sam C. Bonney
SAM C. BONNEY
Attorney for Respondent

NOTICE OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK
SUPREME COURT COUNTY OF SENECA

ANNA MARIE NICIT, Petitioner, -vs- JOHN J. NICIT, Respondent.	Index No. 27611 NOTICE OF MOTION Assigned Judge: Hon. James R. Harvey

SIRS:

Upon the annexed Affirmation of Sam C. Bonney and Affidavit of John J. Nicit, both dated June 27, and the Deposition of Petitioner [to be handed up], Respondent will move this Court at a Special Term to be held on July 11, 1994 at 9:30 A.M. at Canandaigua, New York, for an Order of Summary Judgment.

Answering Affidavits must be served at least 7 days before the return day.

Dated: June 27, 1994

Yours, etc.
s/ Sam C. Bonney
SAM C. BONNEY,
Attorney for Respondent
Office & P.O. Address
20 W. Main St., P.O. Box 316
Waterloo, New York 13165
Phone: 315-539-9211

TO: Seneca County Supreme Court Clerk
50 Johnston Street
Seneca Falls, New York 13148

Harris Beach & Wilcox
Attorneys for Petitioner
130 E. Main St.
Rochester, N.Y. 14604

SUPPORTING AFFIRMATION

STATE OF NEW YORK
SUPREME COURT COUNTY OF SENECA

ANNA MARIE NICIT,
Petitioner

vs.

JOHN J. NICIT,
Respondent.

Index No. 27611
AFFIRMATION
Assigned Judge:
Hon. James R. Harvey

The undersigned, an attorney admitted to practice in the Courts of New York State, affirms the following on penalty of perjury.

1. I am attorney for Respondent and have personal knowledge of the facts herein based upon previous litigation in which I represented Respondent.

2. This proceeding was instituted by service of Show Cause and Petition on March 14, 1994. Answer was served on April 1, 1994. Depositions were taken on June 21. Trial is scheduled for July 11.

3. The Petitioner alleges having obtained an ex parte Alabama divorce decree on November 9, 1993 and now seeks equitable distribution per DRL 236B. The Answer pleads affirmative defenses that said Decree is jurisdictionally void for lack of prerequisite domicile, that 236B is unconstitutional insofar as permits the use of an ex parte foreign decree as a basis for equitable distribution; and that such relief is barred by res judicata.

4. Petitioner departed the marital home in August, 1986 and established a home in Ithaca. An action brought by her in Tompkins County on grounds of cruelty and non-support was non-suited [at the close of her case] in December, 1988. [Decision and Judgment attached as Ex. A]. Another action was brought in Seneca County in August, 1990 on the same grounds, plus hus-

band's alleged refusal to accept an offer to return. Summary judgment of dismissal was affirmed by the Appellate Division on March 13, 1991. [Latter Decision attached as Ex. B].

5. Attached as Ex. C_1-C_3 are relevant papers filed in Alabama action comprising Complaint, Application for default decree/ supporting affidavit of Jerry W. Jackson Esq. and Default Decree.

6. Petitioner's entire deposition is incorporated herein by reference and will be handed up.

WHEREFORE deponent requests an Order granting summary judgment dismissing the Petition, with costs.

Dated: June 27, 1994

s/ Sam C. Bonney

Sam C. Bonney

ALABAMA DIVORCE JUDGMENT ROLL

STATE OF ALABAMA WINSTON COUNTY

ANNA MARIE NICIT,
PLAINTIFF
VS.
JOHN J. NICIT,
DEFENDANT

IN THE CIRCUIT COURT OF WINSTON COUNTY, ALABAMA,
CASE NUMBER: DR-93-2572

COMPLAINT

COMES NOW the Plaintiff, Anna Marie Nicit, and states her claim against the Defendant, John J. Nicit, as follows:

1. That the Plaintiff and the Defendant are both over the age of nineteen (19) years.

2. That the Plaintiff is a bona fide resident citizen of Winston County, Alabama, and has been a resident of the State of Alabama for more than six months next preceding the filing of this Complaint.

3. That the Defendant is a non-resident of the State of Alabama, and whose mailing address is 20 West Main Street, Waterloo, New York 13165.

4. That the Plaintiff and the Defendant were lawfully married to each other on, to wit, the 23rd day of August, 1956, in Seneca County, New York.

5. That the parties separated on, to wit, the 11th day of August, 1986, and since that date have continuously lived in a state of separation.

6. That there are no minor children as issue of the marriage of the parties.

7. That the Plaintiff formerly resided in the State of New York and has initiated a spousal support complaint against the Defendant, and the Defendant is under an order to pay spousal support to the Plaintiff in the amount of $25,000.00 annually.

8. The Plaintiff is entitled to a divorce from the Defendant upon the following statutory grounds:

a) There exists a complete incompatibility of temperaments between the parties such that they can no longer live together as husband and wife.

b) There has been an irretrievable breakdown of the marriage to the extent that any further attempts at reconciliation would be futile and not in the best interest of the parties.

c) The Defendant is guilty of adultery committed after the marriage between the parties.

d) The Defendant has committed actual violence on the person of the Plaintiff intended with danger to the Plaintiff's life or health.

9. The Plaintiff further avers that the parties to this action do not own any property jointly in the State of Alabama.

WHEREFORE, Plaintiff prays for the following relief separately and severally in this cause:

A. That a Summons to which is attached a copy of the Complaint be served forthwith by this Court upon the Defendant, by certified mail, restricted delivery, return receipt requested, at his address, 20 West Main Street, Waterloo, New York, requiring

him to plead or answer to this Complaint within the time allowed by law and the rules of this Honorable Court.

B. That upon a final hearing in this cause, Your Honor will cause to issue out of this Court, a divorce, forever dissolving the bonds of matrimony now existing between the Plaintiff and the Defendant.

C. That the Plaintiff be awarded such other relief as she may be entitled to under the pleading and proof in this cause.

s/ Jerry W. Jackson

JERRY W. JACKSON
ATTORNEY FOR PLAINTIFF
JACKSON & COOK
P.O. BOX 819
HALEYVILLE, ALABAMA 35565

Address of Plaintiff:

1855 Dogwood Lane HC 65
Houston, Alabama 35572

Address of Defendant:

20 West Main Street
Waterloo, New York 13165

Filed
Apr 2 1993
JOYCE MARTIN, REGISTER
CIRCUIT COURT
Winston County, Alabama

STATE OF ALABAMA WINSTON COUNTY

ANNA MARIE NICIT, PLAINTIFF	IN THE WINSTON COUNTY CIRCUIT COURT. CIVIL ACTION NUMBER: DR-93-2572
VS.	
JOHN J. NICIT, DEFENDANT	

APPLICATION TO REGISTER FOR ENTRY OF DEFAULT AND SUPPORTING AFFIDAVIT

The Register is requested to enter a default against the defendant, John J. Nicit, in the above entitled action for failure to plead, answer or otherwise defend as set out in the Affidavit hereto annexed.

s/ Jerry W. Jackson

JERRY W. JACKSON
JACKSON & COOK
ATTORNEY FOR PLAINTIFF
P.O. BOX 819
HALEYVILLE, ALABAMA 35565

FILED
AUG 02 1993
JOYCE MARTIN, Register
CIRCUIT COURT
Winston County, Alabama

STATE OF ALABAMA)
WINSTON COUNTY)

Jerry W. Jackson, being duly sworn deposes and says:

1. That he is attorney of record for the plaintiff and has personal knowledge of the facts set forth in this affidavit.

2. That a Complaint For Divorce was filed in the Winston County Circuit Court by the plaintiff on the 23rd day of April, 1993. That the defendant was served with a copy of the Summons and Complaint by Certified Mail on the 11th day of June, 1993.

3. That more than thirty (30) days have elapsed since the date of service on the defendant.

4. That the defendant has failed to answer or otherwise defend as to the plaintiff's complaint, or to serve a copy of any answer or other defense which he might have upon the undersigned attorney of record for the plaintiff.

5. That the defendant is not an infant or an unrepresented incompetent person.

6. That this affidavit is executed by the affiant herein in accordance with Rule 55 (a) of the Alabama Rules of Civil Procedure for the purpose of enabling the plaintiff to obtain an entry of default against the defendant, for his failure to answer or otherwise defend as to the plaintiff's complaint.

s/Jerry W. Jackson

Affiant- Jerry W. Jackson

Sworn to and subscribed before me on this the 23rd day of July, 1993.

s/Flo Rogers

Notary Public

Default entered against Plaintiff this the 2nd day of August, 1993.

s/Joyce Martin

Register

ALABAMA DECREE

ANNA MARIE NICIT, PLAINTIFF VS. JOHN J. NICIT, DEFENDANT	IN THE CIRCUIT COURT OF WINSTON COUNTY, ALABAMA CIVIL ACTION NUMBER: DR-93-2572

DEFAULT DECREE OF DIVORCE

This action came on Motion of the Plaintiff for a Default Judgment pursuant to Rule 55(b)(2) of the *Alabama Rules of Civil Procedure*, and the Defendant having been duly served with a Summons and Complaint and not being an infant or an unrepresented incompetent person and having failed to plead or otherwise defend, and his default having been duly entered, the Defendant having taken no proceeding since such default was entered, and upon the Affidavit of the Plaintiff.

It is therefore, **ORDERED, ADJUDGED AND DECREED** by the Court as follows:

1. That the bonds of matrimony heretofore existing between the Plaintiff and the Defendant are dissolved, and the Plaintiff is forever divorced from the Defendant on the grounds as set forth in the Complaint.

2. That neither party shall remarry except to each other within sixty days of the date of this decree, and in the event an appeal is taken from said decree then neither party shall again remarry except to each other during the pendence of said appeal.

3. That the terms and conditions of any previous order of separate maintenance, entered by any Court of the State of New York, are incorporated by reference in this decree, and in no way shall supersede any provisions of said support decree.

4. That the costs of this cause having heretofore been paid, then no execution shall be issued.

DONE AND ORDERED this the 9th day of Nov., 1993.

s/Ann R. Richardson

JUDGE

STATE OF ALABAMA)
WINSTON COUNTY)

The undersigned Register of the Circuit Court of Winston County, Alabama, does hereby certify that the foregoing is a true copy of the original decree of divorce granted by said Court in the above-stated cause, as the same appears on record and on file in my office in Double Springs, Alabama.

Witness my hand and the Seal of the Circuit Court of Winston County, Alabama, this 9th day of Nov., 1993.

s/ Joyce Martin

Joyce Martin, Register

FILED
NOV 09 1993
JOYCE MARTIN, Register
CIRCUIT COURT
Winston County, Alabama

SPECIAL TERM DECISION DENYING
SUMMARY JUDGMENT

STATE OF NEW YORK
SUPREME COURT COUNTY OF SENECA

ANNA MARIE NICIT, Index No. 27611

Petitioner, DECISION

vs.

JOHN J. NICIT,

Respondent.

Petitioner obtained a default Decree of Divorce from the Circuit Court of Winston County Alabama on November 9, 1993. Petitioner then sought a scheduling order from the Seneca County Supreme Court setting a trial date for equitable distribution of the parties' marital property pursuant to Domestic Relations Law §236(b)(5)(6). Respondent now moves pursuant to notice of motion dated June 27, 1994 for an Order granting him summary judgment dismissing the petition with costs on the basis that Alabama lacked jurisdiction to grant the underlying divorce decree.

At examination before trial several documents were marked for the purpose of substantiating petitioner's claim of intent to establish a domicile in Alabama. These included her surrender of her New York operator's license, her Alabama operator's license and registration, her Alabama voter's registration, two deeds to Alabama land and an Alabama income tax return. Respondent asserts that these indices are insufficient to establish that the petitioner was a bona fide resident of the State of Alabama for six months prior to obtaining the judgment pursuant to Section 30-2-5 of the Code of Alabama 1975.

Whether a divorce decree in a proceeding in which the non-resident defendant did not appear is entitled to full faith and credit depends upon whether the plaintiff was domiciled in the state granting the divorce. Where neither party was domiciled in the state granting the divorce at the time the suit was instituted, the Decree of Divorce is not entitled to full faith and credit in this state. ***Williams v. North Carolina***, 325 US226 (1945), ***Olmstead v. Olmstead***, 190 NY458 (1908). Further, the mere fact that the court granting the divorce found that it had power to award the judgment does not foreclose re-examination by this court. A heavy burden of proof is imposed on the challenger however to establish the lack of domicile and the divorce forum is presumed to have jurisdiction. Upon a finding in this state in accordance with the foreign divorce forum's finding of existence of bona fide domicile this state is bound to give full faith and credit to the foreign divorce at least insofar as it dissolves the marital status. (1 Foster and Freed Law and the Family §9:10).

In this case although it is clear that the petitioner travels extensively in her recreational vehicle and maintains ties with friends, family and church in New York, her acts indicate a settled intent to permanently sever her connections with New York and to permanently make Alabama her home. Since Alabama was the domicile of the petitioner and had been for a period of six months prior to her obtaining a default Divorce Decree. The Alabama court had jurisdiction to render the Divorce Decree and that Decree is entitled to full faith and credit by this Court.

This constitutes the Decision of the Court.

ENTER

s/ James R. Harvey

JAMES R. HARVEY
Acting Supreme Court Justice

Dated this 11th day of July,
1994 at Canandaigua, New York

APPELLATE DIVISION AFFIRMANCE

1793. (Seneca Co.) — ANNA MARIE NICIT, RESPONDENT, V JOHN J. NICIT, APPELLANT. — Order unanimously affirmed with costs. Memorandum: Supreme Court properly denied respondent's motion for summary judgment dismissing the petition. The record supports the court's determination that petitioner had acquired a bona fide domicile in Alabama at the time the divorce action in that State was commenced (*see, Wilke v Wilke,* 73 AD2d 915; *cf. Manasseri v Manasseri,* 121 AD2d 697). The evidence submitted by respondent is insufficient to support his allegation of lack of domicile (*see,* 48 NY Jur 2d, Domestic Relations, § 1474, at 415). The instant proceeding is not barred by res judicata (*see, Nikrooz v Nikrooz,* 167 AD2d 334, 335; 48 NY Jur 2d, Domestic Relations, § 1465, at 399). We reject respondent's contention that petitioner is precluded from maintaining this proceeding on the ground that she obtained the foreign divorce judgment (*see,* Domestic Relations Law § 236 [B] [2] [5]; *Mattwell v Mattwell,* 194 AD2d 715). (Appeal from Order of Supreme Court, Seneca County, Harvey, J. — Equitable Distribution.) PRESENT: DENMAN, P.J., GREEN, BALIO, CALLAHAN, BOEHM, JJ. (Filed Dec. 23, 1994.)

[Reported in 210 A.D.2d 987]

FINDINGS EXCERPTS

16. Petitioner listed for sale with a real estate agent her two parcels of property on Irish Hill Road in Tompkins County New York in September of 1992 (Exhibits 19 and 20), closed out her bank accounts and left for the State of Alabama in late September of 1992 and arriving at the Houston, Alabama area on or about October 5, 1992.

17. Petitioner looked for land in Alabama to purchase and, on October 19, 1992, did purchase lots #22 and #23 in the Dogwood Lane subdivision in Haleyville, Winston County, Alabama (Exhibit 26).

18. During October 1992 the petitioner expended $3,014.69 to improve the lot on Dogwood Lane, becoming part of the electric cooperative, having her phone installed and otherwise making the property at Dogwood Lane her permanent place of residence (Exhibit 30).

19. Petitioner registered to vote in Winston County, Alabama on October 14, 1992 (Exhibit 31), obtained an Alabama drivers license (Exhibit 45) and paid 1992 Alabama Income Tax for the portion of the year that she was a resident of Alabama (Exhibit 28). Petitioner voted in the presidential election in 1992 from Winston County, Alabama and also opened a bank account in Alabama in October of 1992.

41. The petitioner was granted a divorce by a competent court in the State of Alabama which had personal jurisdiction over her and in rem jurisdiction over the marriage (Exhibit 24). The respondent was given due process rights with regard to that proceeding and the proceeding of the courts of the State of Alabama will be given full faith and credit under the constitution of the

United States.

CONCLUSIONS OF LAW EXCERPT

2. The Alabama Divorce Decree obtained by the petitioner from the respondent is entitled to full faith and credit.

EXCERPTS FROM JUDGMENT

At a Trial Term of the Supreme Court held in Canandaigua, New York, on the 5th day of December, 1994.

DEC 12 3 03 PM '94
SENECA COUNTY
CLERK'S OFFICE

PRESENT: HONORABLE JAMES R. HARVEY
Acting Justice of Supreme Court

STATE OF NEW YORK
COUNTY OF SENECA SUPREME COURT

ANNA MARIE NICIT,

Petitioner, JUDGMENT

-vs-

Index No. 27611

JOHN J. NICIT,

Respondent.

Petitioner having brought this application by service of an Order to Show Cause and Petition for equitable distribution following a foreign divorce on or about March 19, 1994 by personal service of said papers on the defendant who duly answered in this proceeding and fully participated in all aspects thereof, and the issues having been tried before the Court on July 11, 12, 13 and August 9 and 12 and the parties having submitted their proposed findings of fact and conclusions of law and trial briefs and this Court having made the findings of fact and conclusions of law dated October 28, 1994, and the Court having held a hearing on

this issue of the amount of counsel fees to be paid by the respondent on November 18, 1994;

NOW, UPON motion of Harris Beach & Wilcox, David C. Boysen, Esq., of counsel, it is

ORDERED, ADJUDGED AND DECREED, that the Decree of Divorce granted by the Circuit Court of Winston County, Alabama, Civil Action Number 9R-93-2572 on or about November 9, 1993 is granted full faith and credit by this Court under the Constitution of the United States; and it is further

DECISION OF AFFIRMANCE BY APPELLATE DIVISION

0987. (Seneca Co.) — MATTER OF ANNA MARIE NICIT, RESPONDENT, V JOHN J. NICIT, APPELLANT. — Judgment unanimously affirmed with costs. Memorandum: In this proceeding to obtain a distribution of marital property following a foreign divorce judgment, Supreme Court properly determined that the appropriate date for the valuation of marital property was the commencement date of the instant proceeding rather than the commencement date of the prior unsuccessful divorce action (*see, Sullivan v Sullivan,* 201 AD2d 417; *see also, Marcus v Marcus,* 135 AD2d 216, 220-221; Scheinkman, Practice Commentaries, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law C236B:4, at 197). In view of the factors set forth in Domestic Relations Law § 236 (B) (5) (d), the equal division of marital property was not inequitable or an abuse of discretion (*see, Urtis v Urtis,* 181 AD2d 1001). The record supports the court's determination that respondent's transfer of over $117,000 to the parties' daughter constituted a wasteful dissipation of marital assets (*see,* Domestic Relations Law § 236 [B] [5] [d] [11]). We reject respondent's contentions that the award of counsel fees was not authorized pursuant to Domestic Relations Law § 237 (*see, Mattwell v Mattwell,* 194 AD2d 715, 717) and that the award constituted an abuse of discretion (*see, DeCabrera v Cabrera-Rosete,* 70 NY2d 879, 881). (Appeal from Judgment of Supreme Court, Seneca County, Harvey, J. — Equitable Distribution.) PRESENT: GREEN, J.P., LAWTON, WESLEY, DOERR, DAVID, JJ. (Filed July 14, 1995.)

STATE OF NEW YORK
SUPREME COURT COUNTY OF SENECA

ANNA MARIE NICIT,

Petitioner

-vs-

JOHN J. NICIT,

Respondent.

Index No. 27611

NOTICE OF APPEAL

SIRS:

Respondent hereby appeals to the Court of Appeals from an Order of the Appellate Division entered July 14, 1995 and will also bring up for review the Order of that Court entered December 23, 1994 [CPLR 5501(a)(1)]. [The constitutional questions decided by the latter Order were a necessary predicate of the Order of July 14, 1995 hence were "directly involved" therein [CPLR 5601(b)(1)].

The grounds hereof are errors of law and abuse of discretion as a matter of law.

Dated: July 25, 1995

Yours, etc.
s/ Sam C. Bonney
SAM C. BONNEY
Attorney for Respondent
Office & P. O. Address
20 W. Main St., P. O. Box 316
Waterloo, New York 13165
Phone: 315-539-9211

TO: SENECA COUNTY CLERK
CLERK OF THE APPELLATE DIVISION
CLERK OF THE COURT OF APPEALS
HARRIS, BEACH & WILCOX
Attorneys for Petitioner

State of New York,
Court of Appeals

NOV 07 1995

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the second day of November 1995

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

4-10 Mo. No. 1138
In the Matter of Anna Marie Nicit,

Respondent,

v.

John J. Nicit,

Appellant.

The appellant having filed notice of appeal and a motion for leave to appeal to the Court of Appeals in the above cause, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, on the Court's own motion, that the appeal be and the same hereby is dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; and it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied.

s/ Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

SEAL: State of New York
Court of Appeals

No. 95-1211

Supreme Court, U.S.
FILED
FEB 29 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

JOHN J. NICIT,

Petitioner,

vs.

ANN MARIE NICIT,

Respondent.

On Petition for Writ of Certiorari to the New York Supreme Court, Appellate Division, Fourth Department

RESPONDENT'S BRIEF IN OPPOSITION

DAVID C. BOYSEN
Counsel of Record
LAURA J. WILSON
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23 pp

QUESTIONS PRESENTED

1. Whether the Alabama divorce decree duly entered in the Circuit Court of Winston County, Alabama is valid?

2. Whether the Alabama divorce decree is entitled to full faith and credit?

3. Whether petitioner has presented any issues appropriate for Supreme Court review?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	ii
Preliminary Statement	1
Statement of Facts	1
Statement of the Case	3
Reasons for Denying the Writ	4
I. The Alabama divorce decree is valid.	4
II. The lower courts properly accorded full faith and credit to the Alabama divorce decree, and Mr. Nicit's due process rights were not violated.	5
III. There is no basis for granting a petition for writ of certiorari to Petitioner.	10
Conclusion	11

TABLE OF CITATIONS

Cases Cited:

Braunstein v. Braunstein, 114 A.D. 2d 46, 497 N.Y.S. 2d 58 (2d Dept. 1985)	7

Contents

	Page
Douropoulos v. Douropoulos, 67 Misc. 2d 518, 323 N.Y.S. 2d 92 (S. Ct. Queens Co. 1971)	6
Lansford v. Lansford, 96 A.D. 2d 832, 465 N.Y.S. 2d 583 (2d Dept. 1983)	7
Mahoney v. Mahoney, 131 A.D. 2d 822, 517 N.Y.S. 2d 184 (2d Dept. 1987)	7
Mattwell v. Mattwell, 194 A.D. 2d 715, 600 N.Y.S. 2d 98 (2d Dept. 1993)	6, 7, 8
Peterson v. Goldberg, 180 A.D. 2d 260, 585 N.Y.S. 2d 439 (2d Dept. 1992)	7, 8, 9
Rosenstiel v. Rosenstiel, 368 F. Supp. 51 (S.D.N.Y. 1973), *aff'd*, 503 F.2d 1397 (2d Cir. 1974)	6
Williams v. North Carolina, 317 U.S. 287, 63 S. Ct. 207 (1942)	4, 6, 7, 10
Williams v. United States, 317 U.S. 287 (1942)	7
Statute Cited:	
Domestic Relations Law § 236B	7, 10
United States Constitution Cited:	
Article IV, Section 1	6

Contents

Page

Rule Cited:

Supreme Court Rule 1 10

APPENDIX

Appendix A — Order Entered February 3, 1995 ..... 1a

Appendix B — Order Entered July 14, 1995 ..... 2a

Appendix C — Decision Filed September 29, 1995 ... 3a

Appendix D — Order Dated November 2, 1995 ..... 4a

Appendix E — Order Dated January 9, 1996 ..... 6a

Appendix F — Decision Dated January 9, 1996 ..... 7a

PRELIMINARY STATEMENT

Respondent Anna Marie Nicit (hereinafter "respondent" or "Mrs. Nicit") respectfully submits this brief in opposition to Petitioner John J. Nicit's (hereinafter "petitioner" or "Mr. Nicit") petition seeking a writ of certiorari.

STATEMENT OF FACTS

The parties were married in 1956 and had three children, two of whom are deceased. The third is emancipated. (A. 10).[1] At the time of their marriage, Mr. Nicit was a practicing attorney in Seneca County. Mr. Nicit practiced law throughout the parties' marriage at his own firm, Nicit & Bonney. (R. 152-154). Mr. Nicit continued to practice full-time at the time of trial and throughout these proceedings, he has either represented himself or been represented by his partner. (R. 524-530).

Mrs. Nicit performed the traditional duties of a wife and mother and attempted to help Mr. Nicit's political career. After intermittent marital difficulties including more than one separation, the parties separated in 1986. (R. 253).[2] Mrs. Nicit moved out of the marital home and ultimately purchased two parcels of property in Waterloo, New York. She also purchased a recreational vehicle in which she lived. (R. 257-261).

Mrs. Nicit sued Mr. Nicit for divorce in 1987, which action Mr. Nicit actively opposed. That action was dismissed in 1988.

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1. "A." refers to the Appendix submitted by respondent on appeal below and duly filed and indexed with the New York State Appellate Division, Fourth Department.

2. "R" refers to the Record submitted by respondent on appeal below and duly filed and indexed with the New York State Appellate Division, Fourth Department.

Mrs. Nicit later sued Mr. Nicit for divorce in 1990 and that action was dismissed in 1991. (A. 11).

Mrs. Nicit sued Mr. Nicit for support in 1989 and a family court order of support from the Family Court, Tompkins County, New York, was entered in 1989 for $25,000 per year. (R. 357-365). Mrs. Nicit was required to return to court in order to enforce the order. Mr. Nicit moved to modify the order in 1990 but was unsuccessful. (R. 357-365). There was also evidence at trial that Mr. Nicit, in preparing the 1991 order dismissing Mrs. Nicit's complaint, improperly added relief which had not been granted by the court, forcing Mrs. Nicit to bring a motion to settle the order. (R. 524-531).

Mrs. Nicit is seventy years old, and suffers from health problems and is unable to work. Specifically, she was diagnosed with cancer in 1992 and has undergone numerous chemotherapy treatments and surgery. She also suffers from arthritis and is being treated with medication. (R. 161-164).

The record shows that the respondent relocated to Alabama in early October of 1992 (R-58). The record is clear that she purchased property in Alabama on or about October 19, 1992 on which she established her home. (R-51, 60). The record is also clear that the respondent paid Alabama state income taxes for the portion of the year after which she became a resident (R-52-54) and that she filed her federal tax return using the Alabama address as well for 1992. The respondent testified extensively at the deposition concerning her intent to make Alabama her home. Prior to moving, Mrs. Nicit put up for sale the two parcels of land on which she had been living in New York and purchased land in Alabama in October 1992. (R. 197-198).

In 1993 she brought an action in Alabama for divorce which was commenced by personal service upon Mr. Nicit, Mr. Nicit

defaulted and the divorce was granted. (A. 8). Mrs. Nicit then brought this action for equitable distribution which is the subject of Mr. Nicit's petition to this Court.

STATEMENT OF THE CASE

Mrs. Nicit commenced an action for divorce in 1993 in the Circuit Court of Winston County, Alabama, where she resides. (A. 10). Mr. Nicit was served both by mail and personally with the summons and complaint in that proceeding. Mr. Nicit chose not to appear and the matter proceeded by default. Mrs. Nicit was granted a decree of divorce which terminated the marital relationship between the parties but did not affect their property rights and specifically stated that it did not affect the prior Family Court order for support granted by the Family Court in Tompkins County, New York, in favor of Mrs. Nicit. (A. 12).

On February 15, 1994, by way of Order to Show Cause, Mrs. Nicit brought a proceeding for equitable distribution of the parties' marital property in New York Supreme Court, Seneca County. Mr. Nicit duly answered and the trial court had personal jurisdiction over the parties. On June 27, 1994, Mr. Nicit moved for summary judgment which was heard by the Court on July 11, 1994. Mr. Nicit's motion was denied. (A. 10). Mr. Nicit tried to obtain a stay pending his appeal, but was refused. Mr. Nicit appealed the trial court's denial of his motion for summary judgment, which was affirmed by the Appellate Division of the Supreme Court, Fourth Department, on December 23, 1994. (A. 45).

This case was tried in Seneca County Supreme Court before Judge James R. Harvey on July 11, 12 and 13, August 9 and 11, on the equitable distribution issues and November 18, 1994 on the issue of counsel fees. Final judgment was entered by the court on December 5, 1994, from which judgment Mr. Nicit also

appealed. Mr. Nicit's appeal of the trial court's decision to the Appellate Division, Fourth Department, was similarly unsuccessful, and costs were awarded to Mrs. Nicit. (Resp. App.[3] 2a-3a).

Mr. Nicit then appealed both the denial of his motion for summary judgment and the trial court's decision on the merits to the New York State Court of Appeals. Mr. Nicit's motion seeking leave to appeal and appeal as of right was denied by the Court of Appeals with regard to both decisions. (Resp. App. 1a, 4a-5a). Mr. Nicit then moved for reargument to the Court of Appeals, which was denied with costs. (Resp. App. 6a-7a). This petition seeking a writ of certiorari ensued.

REASONS FOR DENYING THE WRIT

I.

THE ALABAMA DIVORCE DECREE IS VALID.

The decree upon which Mrs. Nicit's subsequent equitable distribution action was based is found in the Appendix at page 8. The decree was duly filed in Alabama, and as such, is presumptively valid. *Williams v. North Carolina*, 317 U.S. 287, 63 S. Ct. 207 (1942).

At no time has Mr. Nicit attempted to attack the Alabama decree, either prior to its entry or subsequent to the service and filing of the decree. Mr. Nicit complains that there is not sufficient evidence of domicile in the papers filed by Mrs. Nicit in Alabama; however, it is clear based upon Mr. Nicit's own admission that he was not present for any of the proceedings had in Mrs. Nicit's Alabama action. Clearly, any testimony or

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3. "Resp. App." refers to respondent's appendix which is attached hereto.

pleadings presented by Mrs. Nicit or her counsel were sufficient to satisfy the Alabama judge that jurisdiction existed over Mrs. Nicit and hence, the parties' marriage. In any event, Mr. Nicit was given the opportunity to appear and oppose the entry of the divorce, which he failed to do.

In addition, it is clear based even upon the proceedings had in New York State that Mrs. Nicit is domiciled in Alabama, and was at the time the divorce action was commenced. As is more fully set forth in the "Statement of Facts" section of this brief, substantial testimony was given by Mrs. Nicit at her deposition and again at trial with regard to Mr. Nicit's claim that Alabama did not have jurisdiction over Mrs. Nicit at the time the decree was entered. In light of said testimony, the trial court found, and the Appellate Division of the New York State Supreme Court affirmed, that Mrs. Nicit was and is a resident of Alabama, and that the decree is, as a result, valid.

II.

THE LOWER COURTS PROPERLY ACCORDED FULL FAITH AND CREDIT TO THE ALABAMA DIVORCE DECREE, AND MR. NICIT'S DUE PROCESS RIGHTS WERE NOT VIOLATED.

Mr. Nicit claims that his rights under the United States Constitution were violated because the Alabama divorce decree was used as a basis to entitle Mrs. Nicit to equitable distribution of marital property located in New York State. The parties were divorced by a decree of divorce issued by the Circuit Court of Winston County, Alabama on November 9, 1993. An exemplified copy of that decree of divorce was admitted into evidence as Exhibit 24. (A. 8).

A foreign decree of divorce validly procured by a party who is a bona fide domiciliary of the rendering State is entitled full faith and credit in every other State, even though the other party was not domiciled in the rendering State and did not appear in the action. United States Constitution, Article IV, Section 1; *Williams v. North Carolina*, 317 U.S. 287, 63 S. Ct. 207 (1942); *Douropoulos v. Douropoulos*, 67 Misc. 2d 518, 323 N.Y.S. 2d 92 (S. Ct. Queens Co. 1971).

The party attacking the validity of the sister State judgment has the burden of establishing its invalidity since there is a presumption of the validity of the foreign judgment. *Williams v. North Carolina, id.; Douropoulos v. Douropoulos, id.*

It is clear that the creation and changing of one's domicile is a question of fact. *Rosenstiel v. Rosenstiel*, 368 F. Supp. 51 (S.D.N.Y. 1973), *aff'd*, 503 F.2d 1397 (2d Cir. 1974). The documents admitted into evidence and the testimony in this case are overwhelming in proving that Mrs. Nicit severed her ties with New York State and moved her residence to Alabama in early October of 1992. Prior to leaving New York, Mrs. Nicit placed the two parcels of land on which she previously lived up for sale with a local realtor. She relocated her bank accounts to Alabama, purchased land there on October 19, 1992, took steps both before and after October 19 to improve that land, voted in the presidential election from Alabama in 1992, paid Alabama state income tax for the period of time she was a resident in 1992, obtained an Alabama driver's license and made her residence there.

Under New York and federal case law, a foreign divorce decree is entitled to full faith and credit to the extent that it dissolves a marriage, but may not be enforceable to the extent that it affects a party's property rights where that party is a resident of New York State. *Mattwell v. Mattwell*, 194 A.D.2d 715, 600 N.Y.S. 2d 98 (2d Dept. 1993).

Clearly, the Alabama divorce decree did not address property division, which is why Mrs. Nicit was required to bring a petition for equitable distribution in New York State. However, Mr. Nicit makes the circular argument that because Mrs. Nicit's equitable distribution petition in New York was brought as a result of her obtaining a valid divorce in Alabama, Mr. Nicit's rights have been violated by the Alabama divorce decree, even though it did not address property division. This position is contrary to the law of New York State and, moreover, to United States Supreme Court case law. *Williams v. United States,* 317 U.S. 287 (1942).

Under New York law, once a party has obtained a divorce in a foreign jurisdiction, that party may seek equitable distribution of property pursuant to that decree as against a New York resident. Domestic Relations Law § 236B; *Mattwell v. Mattwell,* 194 A.D.2d 715, 600 N.Y.S. 2d 98 (2d Dept. 1993); *Peterson v. Goldberg,* 180 A.D.2d 260, 585 N.Y.S.2d 439 (2d Dept. 1992); *Mahoney v. Mahoney,* 131 A.D.2d 822, 517 N.Y.S. 2d 184 (2d Dept. 1987); *Braunstein v. Braunstein,* 114 A.D.2d 46, 497 N.Y.S. 2d 58 (2d Dept. 1985); *Lansford v. Lansford,* 96 A.D.2d 832, 465 N.Y.S. 2d 583 (2d Dept. 1983). Moreover, this Court addressed the constitutionality of enforcing a decree of divorce arising from a foreign divorce decree, and has found same to be appropriate. *Williams v. North Carolina,* 317 U.S. 287 (1942).

The *Mattwell* case is on point and makes clear that Mr. Nicit's argument is without merit. In that case, the husband sought equitable distribution of marital property located in New York State after obtaining an ex parte foreign divorce. The wife challenged the court's authority to distribute property pursuant to the ex parte divorce decree. The court held:

> In the present case, the former husband claimed an interest in New York marital

> property. In accordance with the plain language of the governing statutes (see, Domestic Relations Law § 236[B][2], [5], [9]), and in accordance with our precedent, he may therefore commence an action for equitable distribution of property following the entry of the ex parte foreign judgment of divorce.

Id. at 718, 600 N.Y.S. 2d at 100 (citations omitted).

The *Peterson* case also presents facts identical to the instant action. There, the plaintiff moved out of state and obtained an ex parte divorce. The defendant remained in New York. The court held that, although the foreign divorce decree could not address equitable distribution issues, the decree was entitled to full faith and credit with regard to the dissolution of the parties' marriage.

> Clearly, the Florida judgment terminated the parties' status as husband and wife and that judgment must be accorded full faith and credit in the courts of New York. (*See, Williams v. North Carolina*, 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942); *Elson v. Elson*, 149 A.D.2d 141, 545 N.Y.S. 2d 311) (2d Dept. 1989). It is equally well settled, however, that a valid ex parte foreign divorce terminates only the marital status of the parties. Such a divorce is 'divisible' in that it has no effect upon the property held by the parties outside of the jurisdiction of the state issuing the judgment. (*See, Vanderbilt v. Vanderbilt*, 1 N.Y. 2d 342, 153 N.Y.S. 2d 1, 135 N.E. 2d 553, *aff'd*, 354 U.S. 416, 77 S. Ct. 1360, 1 L. Ed. 2d 1456; *Lansford v.*

> *Lansford*, 96 A.D.2d 832, 834, 465 N.Y.S. 2d 583; *Burford v. Burford*, 24 A.D.2d 491, 261 N.Y.S. 2d 489; *Anello v. Anello*, 22 A.D.2d 694, 253 N.Y.S. 2d 759; see generally, Note, Divisible Divorce 76 Harv. L. Rev. 1233; *cf.*, *Kindler v. Kindler*, 60 A.D.2d 753, 754, 400 N.Y.S. 2d 605). Accordingly, to provide for the distribution of property not affected by a foreign judgment of divorce, Domestic Relations Law § 236(B)(2) and (5) provide that a divorced spouse who possesses an interest in marital property within this State may commence an action for equitable distribution of property following entry of a foreign judgment of divorce (*see, Nikrooz v. Nikrooz*, 167 A.D.2d 334, 561 N.Y.S. 2d 301; *Mahoney v. Mahoney*, 131 A.D.2d 822, 517 N.Y.S. 2d 184; *Braunstein v. Braunstein*, 114 A.D.2d 46, 497 N.Y.S. 2d 58; *Bennett v. Bennett*, 103 A.D.2d 816, 478 N.Y.S. 2d 47; *cf., Elson v. Elson, supra; Mattwell v. Mattwell*, 149 Misc. 2d 505, 565 N.Y.S. 2d 961). The instant action was thus properly converted to one for equitable distribution following the entry of the Florida judgment of divorce.

Id. at 262-263, 585 N.Y.S. 2d at 440-41.

The instant action presents facts identical to the above-cited cases. Mrs. Nicit obtained a valid default divorce in Alabama. The Alabama court made no determination with regard to support or property distribution. Mr. Nicit's argument that Mrs. Nicit cannot, pursuant to an out-of-state divorce decree, seek equitable distribution in New York State is contrary to

established case law in New York State, as well as Domestic Relations Law § 236B, which expressly permits this procedure. Mrs. Nicit is entitled to seek equitable distribution in New York State based on the Alabama divorce decree, which is entitled to full faith and credit in New York State.

III.

THERE IS NO BASIS FOR GRANTING A PETITION FOR WRIT OF CERTIORARI TO PETITIONER.

This Court has already addressed the precise issue presented by Mr. Nicit: whether it is constitutional to afford full faith and credit to a foreign divorce decree as against the non-domiciled party. *Williams v. North Carolina*, 317 U.S. 287, 63 S. Ct. 207 (1942). This Court has already determined that such a decree is entitled to full faith and credit.

Mr. Nicit's petition does not meet, nor does it even purport to meet, any of the requirements of Supreme Court Rule 1 outlining the circumstances pursuant to which this Court might consider granting certiorari. Because Mr. Nicit has failed to cite any basis for the granting of certiorari, his petition must be denied.

CONCLUSION

WHEREFORE, based upon the foregoing, Respondent Anna Marie Nicit respectfully requests that this Court deny Petitioner's request for a writ of certiorari.

Respectfully submitted,

DAVID C. BOYSEN
Counsel of Record
LAURA J. WILSON
HARRIS BEACH & WILCOX, LLP
Attorneys for Respondent
The Granite Building
130 East Main Street
Rochester, New York 14604
(716) 232-4440

APPENDIX A — ORDER ENTERED FEBRUARY 3, 1995

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

MOTION NO. 1793/94

PRESENT: DENMAN, P.J., GREEN, CALLAHAN, BALIO, BOEHN, JJ.

ANNA MARIE NICIT,

RESPONDENT,

V

JOHN J. NICIT,

APPELLANT.

Appellant hading moved for leave to appeal to the Court of Appeals from the order of this Court entered December 23, 1994,

Now, upon reading and filing the affirmation of Sam C. Bonney dated January 9, 1995, the notice of motion with proof of service thereof, the opposing affidavit of David C. Boysen sworn to January 12, 1995, and due deliberation having been had thereon,

It is hereby ORDERED, That the motion be, and the same hereby is, denied.

Entered: February 3, 1995 CARL M. DARNALL, Clerk

APPENDIX B — ORDER ENTERED JULY 14, 1995

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

0987

PRESENT: GREEN, J.P., LAWTON, WESLEY, DOERR, DAVIS, JJ.

MATTER OF ANNA MARIE NICIT,

RESPONDENT,

V

JOHN J. NICIT, APPELLANT.

The above named John J. Nicit having appealed to this Court from the judgment of the Supreme Court, entered in the Seneca County Clerk's office on December 12, 1994, and said appeal having been submitted by Sam Bonney of counsel for appellant, David Boysen of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be and the same hereby is unanimously affirmed with costs.

Memorandum that is hereby made a part hereof.

Entered: July 14, 1995

APPENDIX C — DECISION FILED SEPTEMBER 29, 1995

MOTION NO. 987/95

MATTER OF ANNA MARIE NICIT,

RESPT.,

V.

JOHN J. NICIT,

APPLT.

PRESENT: GREEN, J.P., LAWTON, WESLEY, DOERR AND DAVIS, JJ.

Motion for reconsideration and other relief denied.

APPENDIX D — ORDER DATED NOVEMBER 2, 1995

STATE OF NEW YORK
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the second day of November 1995

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

4-10 Mo. No. 1138

In the Matter of Anna Marie Nicit,

Respondent,

v.

John J. Nicit,

Appellant.

The appellant having filed notice of appeal and a motion for leave to appeal to the Court of Appeals in the above cause, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, on the Court's own motion, that the appeal be and the same hereby is dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; and it is

Appendix D

ORDERED, that the said motion for leave to appeal be and the same hereby is denied.

s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX E — ORDER DATED JANUARY 9, 1996

STATE OF NEW YORK
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the ninth day of November 1996

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding*

Mo. No. 1611

In the Matter of Anna Marie Nicit,

Respondent,

v.

John J. Nicit,

Appellant.

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX F — DECISION DATED JANUARY 9, 1996

STATE OF NEW YORK
Court of Appeals

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

DECISION January 9, 1996

Mo. No. 1611

In the Matter of Anna Marie Nicit,

Respondent,

v.

John J. Nicit,

Appellant.

Motion for reargument of motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.

(3)

Supreme Court, U.S.
FILED
MAR 11 1996
CLERK

No. 95-1211

In The

Supreme Court of the United States

October Term, 1995

JOHN J. NICIT,

Petitioner,

vs.

ANNA MARIE NICIT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF NEW YORK/SUPREME COURT
APPELLATE DIVISION, FOURTH DEPARTMENT

PETITIONER'S REPLY BRIEF

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2 pp

An ancient polemical device, dating back at least to the days of Cicero, is the *ad hominem* thrust — if one doesn't have a good answer to his adversary's argument, then subtly attack his character. Such is Respondent's tactic on P. 2 Par. 1 of her brief. A fair reading in context of the Record below [P. 357-360, 637-8, 671-2] will expose the subtle distortions and half-truths impugning Petitioner's probity.

* * *

There is no medical proof whatever in the record that Respondent ever had cancer; only her say-so.

Petitioner apologizes for even mentioning these completely irrelevant matters but felt that silence might be adversely construed.

* * *

In none of the cases cited on Pages 7-9 of the opposing brief was the constitutionality of DRL 236B raised. Either the foreign divorce court had acquired personal jurisdiction over both parties (as in *Peterson, Mahoney, Bennett, Braunstein & Nikrooz;* not clear in *Mattwell*] or the facts were materially different.

This appears to be the first reported case to raise the constitutional issue.

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Respectfully Submitted

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